COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOs. 002061-95 & 044478-96**
Carol Barone	Employee
East Boston Savings Bank	Employer
St. Paul Fire & Marine Insurance Company	Insurer
Alan S. Rockoff, M.D.	Employer
Eastern Casualty Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein & Carroll[1])

APPEARANCES
Michael P. Joyce, Esq., at hearing, for the employee
William J. Branca, Esq., on appeal, for the employee
Judy Eldredge, Esq., at hearing, for St. Paul Fire & Marine Insurance Company
Ronald N. Sullivan, Esq., on appeal, for St. Paul Fire & Marine Insurance Company
James E. Rame, Esq., for Eastern Casualty Insurance Company

LEVINE, J. The employee appeals a decision of an administrative judge which awarded compensation benefits for a period of incapacity causally related to an industrial injury occurring on January 10, 1995. The employee appeals only the applicable rate of compensation beginning on March 11, 1996. The judge awarded the employee § 34 compensation based on her average weekly wage at the time of her 1995 work injury. The employee contends that, pursuant to § 35B, she is entitled to weekly benefits based on her higher average weekly wage at the time of her March 11, 1996 "subsequent

[1] Judge Carroll recused herself from participation in deciding this appeal.

injury."[2] See Puleri v. Sheaffer Eaton, 10 Mass. Workers' Comp. Rep. 31, 36-40 (1996)(average weekly wage at the time of a § 35B "subsequent injury" to be used for calculating rate of compensation). Because the judge found all the elements of § 35B, we reverse the denial of the § 35B adjustment and award weekly benefits at the higher rate requested.

On January 10, 1995, the employee injured her lower back while lifting a cash box at her job as a bank teller. (Dec. 8.) The insurer paid § 34 benefits on a without-prejudice basis. (Dec. 9) On March 8, 1995, the employee returned to less physical work as a receptionist for a different employer, a doctor's office. She still experienced back and leg pain, and had to take time off. An MRI on March 23, 1995 showed a disc bulge at L5-S1 with early spinal stenosis. (Dec. 10.) The employee returned to work at the doctor's office on or about May 15, 1995. Although her leg pain had improved, she still had back pain and was on pain medication at that time. In late 1995 and early 1996, the employee's back symptoms worsened, and she developed pain, tingling and numbness down her right leg. No specific injury or incident caused the worsening of the employee's symptoms. (Dec. 11.) She had problems performing her job, and on March 12, 1996 she underwent surgery for a recurrent disc herniation at L5-S1. (Dec. 11-12.) The employee has not returned to work since that time. (Dec. 12.)

The employee sought workers' compensation benefits based on the higher average weekly wage of $500.00 earned at the doctor's office compared to her $375.00 weekly earnings at the bank. (Dec. 16; Employee's Request for Findings … and Rulings, pp.8-9.) The employee's principal theory was that she experienced a further period of incapacity based on a recurrence of her 1995 injury, for which the bank's insurer would be liable. See Costa's Case, 333 Mass. 286, 288-289 (1955). And, under § 35B, she would be

[2] General Laws c. 152, § 35B (St. 1970, c. 667, § 1), provides, in pertinent part:

> An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury whether or not such subsequent injury is determined to be a recurrence of the former injury . . . .

entitled to the rate of compensation based on her average weekly wage at the time of that recurrence. (Employee's Request for Further Findings…and Rulings, p.9.) But the employee also argued that if the judge found that her condition was aggravated by her work at the doctor's office, then the doctor's insurer would be liable. Id. at 8.

Both insurers denied her claims for benefits and the matter went to hearing. (Dec. 3-4.) In her hearing decision, the judge concluded that on January 10, 1995 the employee sustained a personal injury arising out of and in the course of her employment with the bank. (Dec. 13.) With regard to the employee's claimed incapacity commencing on March 11, 1996, the judge concluded:

> [T]here was no new injury or aggravation while the Employee worked at Dr. Rockoff's. The Employee's testimony, which I adopt, is that there was no activity, series of activities, events or incident, or series thereof, which injured her.
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> . . .
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> The holding in Zerofski's Case, 385 Mass. 590 (1982) applies to the facts of this case. I conclude that there is no evidence of harm arising from a specific incident or from an identifiable condition not common or necessary to a great many occupations. The Employee alternated between sitting, standing and walking. These activities are common and necessary to many occupations . . . .

(Dec. 17-18.) The judge therefore concluded that the first insurer was liable for the employee's incapacity commencing on March 11, 1996. (Dec. 18). Of particular pertinence to the employee's appeal, the judge added: "Because I do not find a new injury or recurrence at Dr. Rockoff's, Section 35B does not apply notwithstanding that the Employee otherwise comes within the provisions of that Section." Id. The employee appeals that conclusion.

The judge erred in denying the claimed § 35B adjustment in the employee's average weekly wage. The judge found preliminary elements necessary for the application of § 35B: the employee had been receiving workers' compensation, (Dec. 9, 16), and she returned to work for at least two months. (Dec. 11, 12.)[3] The judge denied the application of § 35B on the basis of finding no injury cognizable under that statute.

[3] The insurer St. Paul Fire and Marine does not dispute these findings. (Letter of January 11, 2000.)

(Dec. 18.) This conclusion is incorrect, because the subsidiary findings of fact establish that the employee's condition worsened after she had been working at the doctor's office for at least two months. (Dec. 11.) Such a "worsening," while not a "personal injury" for the purpose of determining the liability of the successive insurer, is a "subsequent injury" under § 35B as a matter of law.

In Don Francisco's Case, 14 Mass. App. Ct. 456 (1982), the court stated: "We construe the terms 'subsequently injured' and 'subsequent injury' to mean a change in the employee's physical or mental condition . . . which occurs at least two months after his return to work." Id. at 461. In a companion case, the court further stated: "if, no less than two months subsequent to an employee's return to work, a deterioration occurs in his physical or mental condition [citations omitted], he is entitled to compensation at the rate in effect on the date he is again required to leave work." Czarniak's Case, 14 Mass. App. Ct. 467, 468 (1982). It is the deterioration, worsening or change that is required for a finding of a § 35B "subsequent injury." Cf. Calheta's Case, 14 Mass. App. Ct. 464, 465 (1982)(no application of § 35B where no further compensable harm to employee, and just a new period of incapacity sought). Indeed, it is just this type of worsening that the judge found on page 11 of the decision: "I credit and adopt [the employee's] testimony that while she was working for [the doctor's office], her back symptoms progressively *worsened* . . . . In the winter of 1995 and early 1996, *her back pain increased significantly* . . . and she developed pain radiating down her right leg, with tingling, numbness, weakness and bladder problems. She had problems performing her job because she could not sit or stand or walk for long periods and missed six days of work." (Emphasis added.)

In Rush v. M.B.T.A., 8 Mass. Workers' Comp. Rep. 270, 273 (1994), the reviewing board summarized the Appeals Court's interpretation of § 35B:

> Under the Don Francisco/Czarniak/Calheta line of cases, § 35B applies where an employee who has sustained an earlier compensable injury suffers a deterioration in his condition to the point of total or partial incapacity through the wear and tear of work, regardless of whether the work effort is common and necessary to a great many occupations. Proof of deterioration is essential; the employee must have

> been able to do the work to which he returned and must have been unable to do so when forced to leave work again at least two months later.

There is thus a distinction between a new "personal injury" under the Act and a "subsequent injury" under § 35B. For there to be a new personal injury, "the harm must arise either from a specific incident or series of incidents at work or from an identifiable condition that is not common or necessary to all or a great many occupations." Zerofski, supra at 594-595. When the issue is which of two or more insurers is liable, "[w]here the most recent incident or condition as [just described] bears a causal relationship to the slightest extent to a subsequent incapacity, it constitutes an aggravation [--a new personal injury--] and subjects the insurer on the risk at that time to liability." Cymerman v. Hiller Co., 11 Mass. Workers' Comp. Rep. 609, 611 (1997).

On the other hand, "[t]he term 'subsequent injury' [as used in § 35B] covers a broader range of harm than does the phrase 'personal injury arising out of and in the course of . . . employment.' [An employee] may have suffered a 'subsequent injury,' even though he did not suffer a [new] personal injury arising out of and in the course of . . . employment.' " Zerofski, supra at 596 n. 7. In Zerofski, the court held that an aggravation of the employee's prior injury, due to years of standing and walking at work, was not a new personal injury. Id. at 591. But the court remanded the case to determine whether the employee suffered a "subsequent injury" within the meaning of § 35B, which would affect the calculation of the employee's rate of compensation. Id. at 596-597. See also Ottani v. Ottani Tree Service, 9 Mass. Workers' Comp. Rep. 633, 639 (1995).

Thus, in the present case, the judge's application of Zerofski's Case, 385 Mass. 590 (1982), to the employee's work at the subsequent employment -- although correct as to the issue of the successive insurer's liability for a new personal injury -- was off the mark with regard to the occurrence of a "subsequent injury" under § 35B. Wear and tear causing an increase in symptoms, as found by the judge here, is within the scope of § 35B's "subsequent injury."

We therefore reverse the decision as to the denial of the claimed § 35B adjustment, and we order the insurer St. Paul Fire & Marine to pay the employee § 34 benefits based on an average weekly wage of $500.00 beginning March 11, 1996.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Filed: **April 14, 2000**